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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1681

GEORGE STEINBERG AND SON, INC.,
Petitioner,

v.

EARL L. BUTZ, Secretary of Agriculture,
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, and Paul Steinberg, as the sole person directly affected by the judgment of the United States Court of Appeals for the Second Circuit, pray that a writ of certiorari issue to review the aforecited judgment made in the above entitled proceeding on February 11, 1974, denying a petition to review an Order of the Secretary of Agriculture.

CITATIONS TO OPINIONS BELOW

The orders denying a petition for rehearing and for an *en banc* hearing by the Court of Appeals were made on March 20, 1974

and are printed as Appendix "A" and "B" respectively.

The orders denying a petition for rehearing and for an *en banc* hearing by the Court of Appeals were made on March 20, 1974 and are printed as Appendix "A" and "B" respectively. The decision of the Court of Appeals dated February 11, 1974, was reported in —Fed.2d—. It is printed as Appendix "C". The decision of the Secretary of Agriculture dated January 18, 1973 was reported in 32 A.D. 236. It is printed in the Appendix before the Court of Appeals (A1-A51). The order of the Secretary of Agriculture dated February 1, 1974 denying reargument appears at (A281).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Was the Director of the Fruit and Vegetable Division, who is not of the rank of Deputy Administrator, authorized to file the instant complaint under Section 7 CFR par 47, which provides:

"(b) Who May File

Disciplinary proceedings may be instituted only upon moving papers filed by the Deputy Administrator acting either as a result of the informal complaint procedure hereinbefore provided or on his own motion"?

*A copy of the Appendix before the Court of Appeals is submitted herewith.

Legend

Citations as (A1-A51) are citations to the United States Court of Appeals Second Circuit Appendix. Citations as (App C page 9) are citations to the Appendix as appears in the back of the instant Petition.

Alternatively stated, was the Secretary charged with adherence to his own promulgated rules?

2. Could the Secretary withhold the benefits of 5 U.S.C. 558(c), the "second chance" doctrine from the respondent below and from Paul Steinberg?

Alternatively stated, has there been adherence to the precept of equal protection of law where the Secretary treats the respondent below by the withholding of the benefits of 5 U.S.C. 558(c) merely because the license has lapsed, when all relevant acts complained of occurred within the license term.

3. Where the Secretary after trial, before the judicial officer, sought to amend his pleadings, after the independent hearing officer recommended dismissal of the complaint, to allege the element of scienter or willfulness, was it consistent with due process of law to refuse to allow respondent below to withdraw a stipulation entered between the parties at the hearing held before the independent hearing officer? (A205)

4. In the absence of compelling public necessity, may a person, i.e., Paul Steinberg, be deprived of his livelihood, and does 7 U.S.C. 499h have the effect of

a. Depriving a person of his right to work without due process of law, (and)
b. Constituting an excessive fine, and cruel and unusual punishment, (and)
c. Constituting a bill of attainder?

Statutes Involved

This case involves 5 U.S.C. 555(c), 5 U.S.C. 551H(8), 5 U.S.C. 558(b), 5 U.S.C. 558 (c), and Section 8 (7 U.S.C. 499h) of the

Perishable Agricultural Commodities, the Fifth Amendment, and the Eighth Amendment of the United States Constitution. The Statutes are printed as Appendix "B".

Statement of Facts

Paul Steinberg is the only person or entity who can be aggrieved by the judgment of the Court of Appeals. Mr. Steinberg is presently employed as a buyer of produce at the Hunts Point Market. In his capacity as a buyer he handles none of the affairs of invoice and payment and is strictly an employee of a standing licensee. The Judicial Officer recognized that the sole practical consequences of the imposition of his ruling in the following terms:

> "Although the only respondent named in the complaint is George Steinberg and Son Inc., the corporation is no longer active and therefore, the real impact of a finding of flagrant and repeated violations by the corporation would be felt only by Paul Steinberg. . . . (A2)

It should be noted that at the argument before the Court of Appeals counsel for Paul Steinberg and Petitioner did present documentary proof that George Steinberg and Son Inc. had been dissolved by proclamation on December 15, 1971.

Paul Steinberg

Paul Steinberg resides in Kings County, is married, and has two young children (A146-A147). His employment in the industry began at age 11 in his father's retail fruit store where he worked each day after school. He served two years in the armed forces and secured an honorable discharge (A147).

In 1961 George Steinberg and Son Inc. was formed (A320). From that time until the time of the petition of involuntary bankruptcy, Paul Steinberg's function was as a buyer at the

market. It was the father, George Steinberg, who handled the internal affairs of the petitioner corporation (A148-A149). On November 19, 1968 an involuntary petition of bankruptcy was served upon the corporation at which time Paul Steinberg takes control of the corporate affairs and George Steinberg retires (A152-A175).

Statement of Case

(a) The Institution of Proceedings.

On the 28th of June 1969, the petitioner-corporation failed to renew its license and allowed it to lapse. The obvious reasons for non-renewal were (1) the known fact that the corporation was in bankruptcy; (2) the fact that George Steinberg, the founder of the petitioner-corporation was seriously ill and disabled and, (3) the known fact that Paul Steinberg by this time had become a salaried employee as a buyer with one Manva Sales Corp., a then established licensee (A14).

Unknown to Paul Steinberg, in July of 1969 the New York Produce Trade Association informed the Secretary by letter of the status of George Steinberg and Son Inc. with reference to the bankruptcy, and the failure to make payment of its invoices (A135). Thereafter without any notification to petitioner, the Secretary commenced an investigation which culminated in the issuance of the subject disciplinary complaint in June of 1979 (A287).

(b) The Trial Hearing (Independent Hearing Officer)

At the trial, three of the witnesses testified as to violations. At that point the standard pretrial stipulation was entered into in which petitioner would admit to the violations. However, the

record contains the clear understanding that Paul Steinberg's position of non-involvement would be litigated and determined as a defense, or in mitigation. It should also be noted that at this time neither party considered the issue of wilfullness or scienter as being relevant to the trial issues (A201, A232, A233).

The Hearing Officer then recommended in her decision that the complaint be dismissed on the grounds that respondent below was not accorded the benefit of Section 9B of the Administrative Procedures Act (5 U.S.C. 558(c)) in that no opportunity to demonstrate or achieve compliance had been accorded to George Steinberg and Son Inc. (A265).

(c) Proceedings Before the Judicial Officer

It is at this point that the Secretary's counsel in an attempt to bypass the Second Chance Doctrine, argues that the complaint should be amended post hoc and after the trial hearing has been closed, to reflect willfulness (A201).

The Judicial Officer's decision found that the plearing problem of the Secretary could be avoided by finding that the benefit of the second chance doctrine U.S.C. 558(c) was not available to George Steinberg and Son Inc. simply because its license had lapsed (A39-A49).

The Judicial Officer further found that it was totally immaterial to the issue as to whether or not Paul Steinberg was proven culpable and that so long as it was proven that Paul Steinberg held 50% of the shares in the corporation that the per se findings would be made and that the consequences of the statute would then be imposed (A49).

The consequences of the statute, 7 U.S.C. 499h, will bar the

employment of Paul Steinberg in the industry for a minimum of one year. Restoration to employable status after the one year bar is discretionary, and the sanction imposed may be permanent. In the state of today's economy, Paul Steinberg, who is approximately 40 years of age and who never worked at another trade, will be sentenced to de facto economic death if the mandate of the statute is allowed to come to execution.

(d) Judicial Review

Petitioner and Paul Steinberg sought judicial review of the admininistrative orders before the United States Court of Appeals for the Second Circuit upon the grounds that:

a. The rulings of the Secretary were arbitrarily capricious and abusive of discretion or otherwise not in accordance with the law (and)

(b) The rulings, findings and conclusions of the Secretary violated due process of law (and)

(c) The rulings, findings and conclusions of the Secretary violate the constitutional rights, privileges and immunities of Paul Steinberg and was not supported by substantial evidence.

The petition to review was denied and the administrative order was affirmed.

Reasons for Granting the Writ

I.

Petitioner argues that this Court is under a duty to assure to Paul Steinberg that the executive branch of the government shall

adhere to its own promulgated regulations. In this era of Watergate, when it has been amply demonstrated that the executive agencies of government have not always followed lawful mandates and procedures, this Court must remain vigilant in its obligation to the end that the law must be followed. See United States v. Robinson, 468 F.2d 189 (1972).

In the case at bar there can be no question but that the promulgated regulation governing the party who was authorized to institute disciplinary proceedings was clear and explicit. The subject regulation as published reads:

> Who may file
>
> Disciplinary proceedings may be instituted only upon moving papers filed by the Deputy Administrator acting either as a result of the informal complaint procedure hereinbefore provided or on his own motion (7 CFR 47.27(b)).

The party issuing the disciplinary complaint upon which the proceeding was based is the Director of the Fruit and Vegetable Division of the Consumer and Marketing Service. It has been petitioner's contention, at all times, that this official was never empowered by statute or regulation to issue the subject complaint.

It is submitted that the Second Circuit erred in its construction of the regulatory scheme. Its interpretation does ignore the specific and particular restriction on reservation clearly recorded in CFR 47.27(b) and, gives its determinative attention to the general delegation sections which specifically provide for delegation of powers unless reserved. Acknowledging the strained interpretation, the Court heroically saves the complaint by concluding:

"The administrative construction of the regulation is consistent with this conclusion and, as such lends it some weight, Thorpe v. Housing Authority, 393 U.S. 268, 276 (1939) (App. C p. 26).

Petitioners urge that there is clear error in the Court's finding of authorization. The act of issuing a complaint to institute disciplinary proceedings is not ministerial. The regulatory scheme places this power and discretion and confidence in one holding the rank of Deputy Administrator. It is he, and "only" he who is charged with discretion to prosecute or alternatively forebear.

The subject promulgated rule 7 CFR 47.27(b) is further enforced by the statutory mandate of 5 U.S.C. 555 (c) to the effect that the Department of Agriculture in issuing process etc. must adhere to the law.

Petitioner concludes this argument with the observation that if the Secretary failed to adhere to his own promulgated regulation, that conduct should not be condoned and the complaint must fail. See Vitarelli v. Seaton, 359 U.S. 535 (1958); Service v. Dulles, 354 U.S. 363 (1957).

II.

Petitioner argues that it is inequitable and discriminatory treatment for the Secretary to withhold the benefits of the Second Chance Doctrine merely because the license of George Steinberg and Son Inc. had lapsed where all relevant acts set forth in the complaint occurred at a time when George Steinberg and Son Inc. was duly licensed and where petitioner has sought reinstatement of the lapsed license.

Throughout the statutory scheme of the involved disciplinary acts and procedures and throughout the various proceedings since November 1970, there appears one glaring truth which is that the per se penalty which is about to fall upon Paul Steinberg and the entire modus of treatment in the premises is placed in the instant posture because of the status of a lapsed license. It is urged that this discrimination cannot be tolerated as the Secretary cannot show a basis for reasonable classification. See Robinson v. State of California, 370 U.S. 661 (1932).

This pervasive discrmination attained its most powerful and significant impact upon petitioner when the decision was reached that George Steinberg and Son Inc. and Paul Steinberg in particular, were not to receive the accorded and mandated benefits of the "Second Chance".

At the conclusion of the trial hearing and in filing her recommended findings the hearing officer had determined:

> "Applying the principles enunciated in American Fruit (American Fruit Purveyors Inc., 30 A.D. 1542) the so-called opportunity to demonstrate or achieve compliance given the Respondent in this case was dated April 21, 1970. This was subsequent to the time Respondent's license lapsed, and after it had been declared an involuntary bankrupt. Accordingly, it had no warning (i.e. a second chance) before an action was instituted. The record does not establish willfulness with respect to the transactions involved (A265).

In reaching the above finding, the hearing officer invoked section 9(b) of the Administrative Procedure Act (5 U.S.C. 558(c)) which states

"Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor the licensee has been given

(1) Notice by the agency in writing of the facts or conduct which may warrant the action; (and)

(2) Opportunity to demonstrate or achieve compliance with all lawful requirements.

It should be further noted by the Court that the term "license" as referred to in the Administrative Procedure Act is defined as:

"license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission" (5 U.S.C.551H(8))

In reversing the hearing officer the Judicial Officer brings the discrimination to its logical but most inequitable conclusion:

"This issue is not involved in this case, however, because no licensee's license is being suspended or revoked. Section 9(b) of the Administrative Procedure Act (5 U.S.C. 558(c)) applies only to actions withdrawing, suspending, revoking or annulling a license". (A39-49)

This discrminatory ruling was then affirmed by the Court as follows:

". . . Since the complaint here contained no allegation of willfulness, the hearing examiner concluded that a "second chance" had to be afforded to the corporation . . . sec. 9b by its own terms applies only to "the withdrawal, suspension, revolcation, or annulment of a license." 5 U.S.C. 558 (c). The American Fruit Purveyors case, relied upon by the hearing examiner below . . ., is obviously

inapplicable since in it there was a currently valid license under PACA . . ." (App. C, pages 26-27)

Petitioner argues that the issue of disparity of treatment in the application of the relevant statutes and proceedings is an issue of equal protection and substantive due process of law in the language of the Fifth Amendment of the United States Constitution. Such issue transcends the case at bar and is of such weight and importance that it deserves the attention of this Court.

III.

Unless this Court intervenes, Paul Steinberg is about to suffer a most sinister form of general punishment. Paul Steinberg, his wife and children, are about to be deprived of their economic livelihood. In the fourth decade of life, and in circumstances of having worked in no other trade, this becomes catastrophic.

When a family looses its bread winner, society has established some nature of protective social instrument or insurance to ameliorate the hardship to the innocents. Thus, if Paul Steinberg were to die or become seriously disabled, his family would receive supportive services from the Social Security system. Or, if Paul Steinberg were to loose his employment due to economic conditions, unemployment compensation would be available. Even if Paul Steinberg were a convicted embezzler or other white collar criminal he, and his family, would receive Society's aid. Were he a first offender statistically there would be an excellent chance of probation with supportive services of a rehabilitative posture.

Even were there to be a jail sentence there would be aid for the Steinberg family.

But Paul Steinberg must suffer purgatory berift of such aids. Charged with nothing, convicted of nothing, he is doomed to suffer deprivation of his livelihood simply because of status to wit – a holder of 50% of the shares in George Steinberg and Son Inc. As stated by the Judicial Officer and affirmed by the Court, Paul Steinberg's involvement or non-involvement is of no concern. This is made dramatically clear in the following pronouncement at A284-285:

> ". . . the mitigating circumstances must relate to the respondent corporation – not to Paul Steinberg. The only respondent is the corporation, and if it is determined that the corporation violated the Act, the only determination as to the sanction to be made by the Judicial Officer is the sanction to be applied to the corporation. Any collateral consequences to Paul Steinberg are those imposed by the statute over which the Judicial Officer has no discretion."

IV.

Petitioner, and Paul Steinberg in particular, failed to receive a fair hearing. The most fundamental concern of this Court is to assure that due process and equal protection of law was, in substance, accorded below. This means that petitioner had to be adequately apprized of the charge it was called upon to defend, and had to have adequate notice of the elements that composed the charge so that such elements could be considered, met, and explained by available proofs in putting forth a defense.

Petitioner's counsel at bar declaims that such fair procedure was not accorded. Rather, after the trial, the Secretary attempted to interject the essential element of willfulness. This is

done before the Judicial Officer in a forum of argument as opposed to sworn testimony and documentary proofs. Petitioner protested this matter upon the record at A205. More important is the fact that both Secretary and the Judicial Officer acknowledged the issue in the following statement in which the Judicial Officer is questioning Secretary's counsel:

> "JUDICIAL OFFICER CAMPBELL: But let's assume that I disagree with all your alternatives and that I determine that it's necessary for me to make a finding of wilfullness in order to agree with the Government in this case?
>
> Now in that case, do you believe it would be unfair to the Respondent to make a finding of wilfullness without affording him an opportunity to defend in which that charge was specifically made?" (A232)

It is submitted that the procedures followed by the Secretary in the case at bar fail to meet minimal requisites of notice and thus fail by this Court's standards as stated in In re Ruffalo Jr., 390 U.S. 544 (1968) in which this Court in finding the disciplinary procedures below as defective observed:

> "These are adversary proceedings of a quasi-criminal nature. Cf. In re Gualt, 387 U.S. 1, 33, 18 L.ed 2nd 527, 549, 807 S.Ct. 1428. The charges must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." (at page 551).

This is particularly true in the case at bar. Counsel for petitioner believing the charges to be in the nature of per se charges entered upon a material stipulation which would never have been entered into had the parties considered willfulness as

an element of the charges. This is made clear upon the record before the Judicial Officer in the following statement in which petitioner's counsel states:

> "Well your Honor, I am in a bit of a quandry and I'll tell you why. Had I been trying this case against an allegation of willfulness, Mr. Becker and Mr. Koenigsberg could have dragged me bodily and never would I have stipulated to knowingly or willfully! Never. I would have put the Government to its proof to the n-th degree." (A205)

In concluding this point petitioner recalls to the Court the precept of fair hearing as enunciated by this Court in Morgan v. United States, 301 U.S. 1 (1937) to the end that:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them . . ." (at page 18)

The record of the procedures below indicate, in the case at bar, a significant violation of this precept.

V.

Paul Steinberg is about to lose his salaried job as punishment sanctioned without a trial by his peers.

This Court is now requested to examine the record and evaluate the impact of the subject statute, 7 U.S.C. 499h, against the criteria of penal sanction as opposed to a remedial deprivation, i.e., cease and desist order.

It should be noted that since Paul Steinberg is simply a salaried buyer who makes no determination as to payment of invoices, his

removal from the industry will not relate to future compliance and his removal is totally estranged from correcting an existing violation. Thus in the terms of Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1952) this sanction of discipline can only be viewed as punishment and penal in nature.

Employment is a valuable possession and its deprivation without due process of law is a serious violation. See Trauex v. Raich, 239 U.S. 33, 38 (1915); United States v. Lovett, 328 U.S. 303 (1943); United States v. Archie Brown, 381 U.S. 437.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari to review the order of the Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
May 5, 1974

Respectfully submitted,

ROBERT A. KATZ
Attorney for Petitioner

Appendix

APPENDIX A

Order Denying Petition for Rehearing dated March 20, 1974

Present:

HON. J. EDWARD LUMBARO,
HON. HENRY J. FRIENDLY,
HON. JAMES L. OAKES,
Circuit Judges

(Title)

A petition for a rehearing having been filed herein by counsel for the petitioner.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX B

Order Denying Rehearing En Banc
dated March 20, 1974

(Title)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioners, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

APPENDIX C

Decision of United States Court of Appeals for the Second Circuit dated February 11, 1974
No. 218—September Term, 1973

[*Title*]

Before LUMBARD, FRIENDLY and OAKES, Circuit Judges.

Petition for review of an order and decision by Donald A. Campbell, Judicial Officer for the Secretary of Agriculture, finding petitioner in flagrant and repeated violation of the Perishable Agricultural Commodities Act, 7 U.S.C. Sec. 499b, and denying petitioner a license required by 7 U.S.C. Sec. 499c.

Petition denied.

Robert A. Katz, New York, N.Y. (Joseph Einhorn, of counsel), *for Petitioner.*

Judith S. Feigen, Department of Justice, Washington, D.C. (Irving Jaffe, Acting Assistant Attorney General, Kathryn H. Baldwin, Department of Justice, Washington, D.C., on the brief), *for Respondents.*

OAKES, *Circuit Judge:*

Petitioner, a corporation, seeks review of an order issued by the Secretary of Agriculture finding petitioner in "flagrant and repeated violation" of the Perishable Agricultural Commodities Act (PACA or Act) and denying its application for a license thereunder. The Secretary's "Judicial Officer" found the

petitioner corporation to have committed such violations of PACA by failure to make full payment on 283 lots of commodities purchased from 19 sellers in violation of 7 U.S.C. Sec. 499b(4). Petitioner makes four main arguments: (1) that the administrative complaint in this action was not signed by the proper official in the Department of Agriculture; (2) that because the hearing officer (as opposed to the judicial officer) found that the record did not establish willfulness with respect to the transactions involved, petitioner was therefore entitled to a so-called "second-chance" under Sec. 9(b) of the Administrative Procedure Act, 5 U.S.C. Sec. 558&c?, providing that the withdrawal or suspension of a license is lawful only if the licensee has been given written notice of the conduct warranting suspension and opportunity to demonstrate compliance with all lawful requirements; (3) that Paul Steinberg, a stockholder and employee of petitioner, cannot be deprived of his right to obtain employment without due process; and (4) that there should be a remand to the Department for a new hearing on the question of willfulness. We reject each of petitioner's arguments and deny review.

Before briefly recounting the underlying factual background of this case, it is well to recall that PACA was originally enacted by Congress in 1930 for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables. *See generally* 1962 U.S. Code Cong. & Ad. News 2749. *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.;, *cert. denied*. 389 U.S. 835 (1967). The essential need for regulation arose in the unfair activities of commission merchants, dealers and brokers who received shipments from growers and shippers. Upon receiving a shipment of perishable commodities, the commission merchants, dealers and brokers would wrongfully reject the shipment, in many cases

making the false claim that the commodities had arrived in a damaged condition or some other claim permitting rejection of the shipment. These fraudulent rejections were made when the market for the commodity was declining so that the commission merchant, dealer or broker would have suffered a loss had he accepted the shipment and paid the contract price. *See* H.R. Rep. 1041, 71st Cong. 2d sess., H.R. Rep. 1546, 87th Cong. 2d sess.

Essentially the Act provides a system of licensing and penalties for violations. Under Sec. 2, 7 U.S.C. Sec. 499b, it is unfair for a commission merchant, dealer or broker to engage in listed unfair practices, including in subsection (4) failure to "make full payment promptly." Section 3 of the Act, 7 U.S.C. Sec. 499c, requires them to obtain a license from the Secretary of Agriculture as a condition of doing business, and Sec. 4 as amended, 7 U.S.C. Sec. 499d, governs the issuance of licenses. Under Sec. 5 of the Act as amended, 7 U.S.C. Sec. 499e, a violator of Sec. 2 is liable for damages to the injured party which may be obtained in an action before the Secretary or by a separate lawsuit, while Secs. 6 and 7 of the Act, 7 U.S.C. Secs. 499f, 499g, relate to complaints to the Secretary for investigation and hearing and provide for the issuance of reparation orders requiring a violator to pay damages. Section 8 as amended, 7 U.S.C. Sec. 499h, provides in subsection (a) the grounds for revocation of licenses by the Secretary for violation and in subsection (b) empowers the Secretary to limit employment within the industry of "any person who is or has been responsibly connected with" such violators.[1]

Petitioner, George Steinberg and Son, Inc., was a New York corporation licensed under §3 of the Act, 7 U.S.C. §499c. Its officers, each of whom owned 50 per cent of the stock, were

George Steinberg, president, and Paul Steinberg, secretary. Between April, 1968, and May, 1969, the corporation purchased, received and failed to pay for 328 lots of perishable agricultural commodities with a total value of $67,641.96. On November 19, 1968, a petition for involuntary bankruptcy was filed against the corporation. At that time George Steinberg retired from the corporation and full and complete control was vested in Paul Steinberg, for whom relief is sought in this petition. On January 8, 1969, a voluntary plan under Chapter XI of the Bankruptcy Act was entered but this was abandoned on June 2, 1969, and the corporation was adjudicated bankrupt. Its license to do business terminated on June 28, 1969, and due to its bankruptcy the corporation failed to renew it.

In July, 1969, the Secretary of Agriculture first learned of the corporation's failure to pay for purchased commodities. An investigation was begun, and notice was sent to the corporation on April 21, 1970, allowing an opportunity to demonstrate or achieve compliance with all of the requirements of the Act. The corporation did not respond to this notice, probably owing to its prior bankruptcy. By complaint filed July 1, 1970, and signed by the director of the Fruit and Vegetable Division, the Steinberg corporation was charged with flagrant and repeated violations of §2 of PACA by reason of its failure to pay the more than $67,000 owed, as previously recounted. The corporation failed to respond, although the complaint notified it that failure to answer would constitute admission of the facts alleged and that failure to request a hearing would constitute waiver of the hearing. Again petitioner alleges that tid did not receive the complaint, which does not seem unlikely in light of its defunct state. A default order against the petitioner was entered but was vacated on January 13, 1971, by the issuance of an order reopening the proceeding. On February 5, 1971, petitioner filed an answer in

which it did not deny the failure to make full payment on perishable agricultural commodities received and accepted in interstate commerce. On March 24, 1971, the corporation applied for a new license under the Act. Paul Steinberg, listing himself as vice president of the corporation, applied for the license in an effort to secure the procedural advantages conferred on parties who are licensed on the day that the complaint is filed. It was specifically stated, however, that the applicant did not seek a license to conduct business and would not conduct business under it until the further approval of the Secretary. The director of the Fruit and Vegetable Division issued a notice to show cause why the license should not be denied, the notice setting fortht the alleged failure of the corporation to make full payment promptly for the 328 lots of commodities previously referred to. By an order dated April 26, 1971, the disciplinary proceeding and the proceeding on the notice to show cause why the license should not be denied were consolidated.

During the subsequent hearing, witnesses affiliated with three unpaid creditors of the corporayion testified that their companies had not received payments on more than 30 shipments, and one witness testified that a check for over $3,000 signed by Paul Steinberg to a creditor had been returned for insufficient funds in 1968. Thereafter the parties stipulated that the corporation had purchased from creditors in interstate commerce perishable agricultural merchandise and admitted violations of §2 of the Act on 328 separate occasions. However, the corporation denied that Paul Steinberg had personal knowledge or involvement in the transactions. Thereafter the Department determined not to pursue violations occurring after January 8, 1969, the date on which the corporation consented to an adjudication in bankruptcy, so that the stipulation was effective only as to 283 violations covering the period from April 24, 1968, through January 7, 1969.

It is an interesting sidelight here that the hearing examiner recommended that respondent's license application should be denied, but also felt that the complaint in the disciplinary proceeding should be dismissed on the basis that the corporation had not been given the "second chance" under §9b of the Administratice Procedure Act, 5 U.S.C. §558(c)[2] because there had been no allegation of willfulness in the complaint, relying on *In re American Fruit Purveyors, Inc.*, 30 A.D. 1542 (1971). The judicial officer, however, in reviewing the matter, requested the corporation to specify any proof which might concern lack of willfulness as that term is defined in *American Fruit Purveyors, supra;* whether any sellers had waived their right to be paid in full; to what extent if any the sellers had been paid; whether there had been any other mitigating circumstances; and on what date if any prior to January 8, 1969, a trustee had been appointed or a committee established with power to direct the actions of the corporation, as opposed to its being directed by Paul Steinberg. The corporation's response indicated that if the case were remanded it would offer proof to show that George Steinberg had a chronic cardiac condition which prevented him from attending to business regularly during 1968; that five of the 19 unpaid sellers knew the risk involved and would waive payment; and that if the corporation had been given the opportunity to make payment in April, 1970, it could have reduced its obligation since the final report of the trustee listed corporate assets in excess of $11,000. Petitioner's counsel also stated that, if willfulness had been in issue, he would not have stipulated to the alleged violations. The judicial officer denied the remand and held that the uncontroverted facts compelled the conclusion that the corporation committed "flagrant and repeated violations of §2 of the Act" by its failure to pay $57,207.42 to 19 sellers on 283 occasions. On the issue of willfulness the judicial officer concluded that the violations were willful, although noting that

willfulness was not relevant since §9b of the APA was not involved because no license was being suspended or revoked. The judicial officer ordered publication of the facts and circumstances relating to the flagrant and repeated violations and ordered that the application for a license be denied. Following a motion for rehearing, reargument and reconsideration which was denied, this petition for review followed and the order of the judicial officer was stayed pending this appeal.

I.

Petitioner argues that only the Deputy Administrator may file disciplinary complaints. Here, however, the director of the Fruit and Vegetable Division signed the administrative complaint. Under 7 C.F.R. §47.27&b? "disciplinary proceedings may be instituted only upon moving papers filed by the Deputy Administrator acting either as a result of the informal complaint procedure hereinbefore provided or on his own motion." The term "Deputy Administrator," nevertheless, is broadly defined to include "any officer or employee of the [Consumer and Marketing] Service to whom authority has heretofore lawfully been delegated, or to whom authority may hereafter lawfully be delegated, to act in his stead." 7 C.F.R. §47.2&e).

The Deputy Administrator for the Consumer and Marketing Service is responsible for general supervision of all of the programs and activities assigned to the Service, including those under PACA. 33 Fed. Reg. 10750-51. These programs are carried out by six commodity divisions, including the Fruit and Vegetable Division. *Ibid.* The Fruit and Vegetable Division is specifically responsible for administering PACA, 33 Fed. Reg.

10752, and the director of that division is delegated authority to perform all duties and to exercise all functions and powers vested in the Deputy Administrator except such authority as is reserved to the administrator, associate administrator or deputy administrators, but there is no specific reservation of authority to issue complaints under PACA. 33 Fed. Reg. 10754-55. Under this 1968 organization set forth in 33 Fed. Reg. 10750 *et seq.*, the director of the Fruit and Vegetable Division, therefore, has the authority to administer PACA and consequently the power to initiate disciplinary proceedings under it. The administrative construction of the regulation is consistent with this conclusion and, as such, lends it some weight. *Thorpe v. Housing Authority*, 393 U.S. 268, 276 (1969). Accordingly, we reject petitioner's first argument.

II.

The petitioner argues that the "second chance" doctrine as set forth in the APA §9b, 5 U.S.C. §558(c), must be applied to this case. As we have said, the hearing examiner agreed with petitioner and, relying on *In re American Fruit Purveyors, Inc.*, *supra*, believed that the corporation must be given an opportunity to demonstrate or achieve compliance, that is, must be given a "second chance," before the complaint is filed except in cases of willfulness. Since the complaint here contained no allegation of willfulness, the hearing examiner concluded that a "second chance" had to be afforded to the corporation. But there are at least two answers to this. First, §9b by its own terms applies only to "the withdrawal, suspension, revocation, or annulment of a license." 5 U.S.C. §558(c). The *American Fruit Purveyors* case, relied upon by the hearing examiner below (and incidentally decided by the same judicial officer who decided the instant case), is obviously inapplicable since in it there was a currently

valid license under PACA. In this case, the issue whether George Steinberg and Son, Inc., committed flagrant and repeated violations of §2 of PACA does not involve the withdrawal, suspension, revocation, or annulment of a license, and the collateral consequences of the determination of that issue upon Paul Steinberg have no bearing on any license issue, since Paul Steinberg was not a licensee. The statutory prohibition against licensees employing for one year a person who was responsibly connected with a corporation found to have committed flagrant and repeated violations is not a sanction involving the suspension or revocation of a license of the responsibly connected person. *Compare* 7 U.S.C. §499h(b)(1) *with* 7 U.S.C. §499h(b)(2). It is undisputed that petitioner Paul Steinberg as an officer and 50 per cent shareholder was "responsibly connected" with George Steinberg and Son, Inc. Accordingly, he is subject to the consequences established in §8a, 7 U.S.C. §499h, if the corporation has committed repeated or flagrant violations. It seems clear enough that the corporation has committed such violations. *Zwick v. Freeman, supra; Fruit Salad, Inc. v. Secretary of Agriculture*, 451 F.2d 162 (1st Cir. 1971).

Moreover, the "second chance" doctrine would apply only if the violations had not been willful. It is clear enough that under §9b, doing an act which is prohibited and doing it intentionally "irrespective of evil motive or reliance on erroneous advice" or "acts with careless disregard of statutory requirements" are willful. *See Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *see also United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243 (1938). Here as in *Zwick v. Freeman*, 373 F.2d at 115, "it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act."

III.

Section 8b of PACA, 7 U.S.C. §499h(b), is constitutional. The restriction upon employment of any person who is or has been reasonably connected with a licensee who has been found to have committed any flagrant or repeated violations of the Act has been held by this court neither to violate the due process clause of the fifth amendment nor to constitute a bill of attainder. We have nothing to add to what has already been said in *Zwick v. Freeman,* 373 F. 2d at 118-20. *See also Birkenfield v. United States,* 369 F.2d 491 (3d Cir. 1966).

IV.

Petitioner seeks a remand on the question of willfulness, arguing that had it known that willfulness was in issue it never would have stipulated to the violations of the Act; the claim is that it has never had an opportunity to present evidence on the question of willfulness. As previously stated, however, willfulness is irrelevant since §9b of the Administrative Procedure Act is not applicable to the case for the reasons stated in part II above. But in any case, the judicial officer gave petitioner an opportunity to make an offer of proof relative to willfulness and about the best that the petitioner could do was to indicate that in connection with a few transactions close to bankruptcy, the petitioner was having some collection problems of its own. But with so many violations charged, the number of its own non-payments that could be explained in this way was very small indeed. Two hundred fifty-three of the violations occurred before the involuntary petition was filed on November 19, 1968. More than 30 of these were proved by witnesses at the hearing prior to the stipulation of violations. There is, in short, nothing new that petitioner could offer which would go to eliminate the con-

sequences of the Act as applicable to Paul Steinberg. We point out, however, that after one year the Secretary may approve his employment by a licensee if a satisfactory bond is given and after two years he may approve such employment without bond. Note 1, *supra*.

We deny review of the order of the Secretary of Agriculture.

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1. The statute in pertinent part reads:

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;

. . . . .

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

2. Section 3(b) of the Administrative Procedure Act, 5 U.S.C. ff558(c), provides in pertinent part:

> . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.
>
> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

APPENDIX D
Statutes Involved

7 U.S.C. 499(b)

1. The statute in pertinent part reads:

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;

. . . . .

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated

violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c), provides in pertinent part:

> . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.
>
> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. 551H

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter membership, statutory exemption or other form of permission."

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1681

GEORGE STEINBERG AND SON, INC., PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

After the Secretary of Agriculture had found that petitioner has engaged in flagrant and repeated violations of the Perishable Agricultural Commodities Act (46 Stat. 531, as amended, 7 U.S.C. 499a, *et seq.* ("the Act")), and denied petitioner a license under the Act, petitioner filed with the court of appeals a petition to review pursuant to 28 U.S.C. 2342, *et seq.* The court of appeals denied review (Pet. App. A3-A14) and denied rehearing (Pet. App. A1-A2), but granted a 30-day stay pending application for a writ of certiorari. The court of appeals denied a second stay application and Mr. Justice Marshall and Mr. Justice Douglas have each denied petitioner's applications for a further stay.

1. Petitioner was[1] a corporation licensed under Section 3 of the Act (7 U.S.C. 499c). Petitioner's sole officers were George Steinberg, president, and his son Paul Steinberg, secretary (C.A. App. A-315.)[2] Between April 1968 and May 1969, petitioner purchased, received and failed to pay for 328 lots of perishable agricultural commodities having a total value of $67,641.96 (C.A. App. A-287). In November 1968, complete control of petitioner was vested in Paul Steinberg (C.A. App. A-158, A-175). Petitioner was adjudicated bankrupt in June 1969, and that same month its license terminated because the company failed to renew it.

In July 1970, the Department of Agriculture filed an administrative complaint charging petitioner with repeated and flagrant violations of the Act by reason of its failure to pay more than $67,000 owed for prior shipments. 7 U.S.C 499b(4) provides that it shall be unlawful for a commission merchant, dealer or broker to fail to make full payment promptly. Petitioner filed an answer "not deny[ing] the failure to make full payment on perishable agricultural commodities received and accepted in interstate commerce" (C.A. App. A-267).[3]

At an administrative hearing, the Department of Agriculture produced witnesses affiliated with three of the unpaid creditors, who confirmed that their

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[1]Petitioner was dissolved subsequent to the actions here in question (Pet. 4).

[2]"C.A. App." refers to the appendix filed in the court of appeals.

[3]The Secretary vacated an earlier default judgment of which petitioner alleged it had not received notice.

companies had not received payment on more than 30 shipments (C.A. App. A-61, A-76, A-97). In addition, one witness testified that in 1968 a check to the creditor signed by Paul Steinberg was returned without payment due to insufficient funds (C.A. App. A-106, A-109). The parties then stipulated that on 328 separate occasions petitioner had failed to pay for commodities received.[4]

The hearing examiner filed a recommended decision suggesting that the complaint be dismissed on the ground that 5 U.S.C. 558(c) required that, absent willfulness, petitioner be given an opportunity to demonstrate or achieve compliance (*i.e.,* be given a "second chance") before the complaint was filed.

While the case was pending on review before the judicial officer, he issued an order requesting petitioner to file an offer of proof concerning, *inter alia,* petitioner's lack of willfulness. The judicial officer specified that he wanted this information to determine whether the case should be remanded for additional evidence. In its response, petitioner stated that, if the case were remanded, it would offer evidence to show that George Steinberg suffered from a chronic cardiac condition, and that, had willfulness been in issue, petitioner would not have stipulated to the alleged violations but would have attempted to demonstrate, through examination of witnesses, "the

[4]The Department subsequently decided not to pursue violations that occurred after the adjudication in bankruptcy. Accordingly, the stipulation remained in effect for 283 violations.

incapacity and unintentional mismanagement by the operating officer George Steinberg" (C.A. App. A-53 to A-57).[5]

The judicial officer denied the remand and held that petitioner had committed flagrant and repeated violations of the Act. Such a finding bars Paul Steinberg, as a person responsibly connected with petitioner, from employment by a licensee under the Act for one year, and thereafter without the approval of the Secretary. 7 U.S.C. 499h(b)(2). The judicial officer also rejected each of petitioner's defenses, including the contentions that the Act is unconstitutional, that the complaint was not signed by the proper official, and that the violations were not willful. On this last issue, the judicial officer concluded that the violations were willful, but noted that willfulness was not a relevant issue since 5 U.S.C. 558(c) applies only if a license is suspended or revoked. The judicial officer ordered publication of the facts and circumstances of the flagrant and repeated violations and of the denial of petitioner's application for a license. The judicial officer denied petitioner's motion for rehearing, reargument and reconsideration. In a comprehensive opinion upon which we mainly rely, the court of appeals denied a petition for a review (Pet. App. A3-A14).

2. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, is correct, and presents no issue warranting further review.

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[5]At oral argument before the judicial officer, petitioner was unable to present evidence of willfulness affecting more than a few of the 283 transactions involved (C.A. App. A-245n to A245o) and, in response to the judicial officer's written inquiry after argument, petitioner presented no further pertinent evidence.

A. The court of appeals (Pet. App. A9-A10) rejected petitioner's contention that the disciplinary complaint had improperly been issued by the Director of the Fruit and Vegetable Division, whereas the regulation authorized only the "Deputy Administrator" to institute such proceedings (7 C.F.R. 47.27(b)), because the regulations also defined "Deputy Administrator" to include a person, like the Director, to whom the relevant authority had been delegated. 7 C.F.R. 47.2(e); 33 Fed. Reg. 10754.

B. The court of appeals (Pet. App. A10-A11) rejected petitioner's reliance upon the "second chance" principle reflected in 5 U.S.C. 558(c), on the ground that the Secretary's actions here did not constitute "the withdrawal, suspension, revocation, or annulment of a license," to which Section 558(c) is by its terms limited. Petitioner's license had lapsed and it was seeking a new license, while Paul Steinberg was not himself a licensee. The court also noted that Section 558(c) was inapplicable where, as here, the violations were found to have been "willful" (Pet. App. A11).

C. The court of appeals (Pet. App. A12-A13) rejected petitioner's claim that it was entitled to a further hearing on the question of willfulness, on the grounds (a) that willfulness was irrelevant because 5 U.S.C. 558(c) was applicable in any event, and (b) that petitioner in fact had the opportunity to present evidence as to willfulness and had given no indication that it had anything to submit as to the great bulk of the violations.

D. Finally, the court of appeals (Pet. App. A12) rejected petitioner's claims as to the unconstitutionality of 7 U.S.C. 499h(b), which restricts the employment by licensees under the Act of "any person who is or has been responsibly connected with any person * * * " found to have committed flagrant or repeated violations. The court held that petitioner's contentions (Pet. 3, 15-16) that Section 499h(b) deprived Paul Steinberg of his right to work, without due process, and constituted an excessive fine, cruel and unusual punishment, and a bill of attainder, had been completely answered in its prior decision in *Zwick* v. *Freeman,* 373 F. 2d 110, 118-120 (C.A. 2), certiorari denied, 389 U.S. 835. See also *Birkenfield* v. *United States,* 369 F. 2d 491, 494-495 (C.A. 3).[6] In *Zwick* the court held that the Constitution does not guarantee an unrestricted privilege to engage in business or to conduct a business as one pleases. Moreover, the court held that the perishable agricultural commodities industry is subject to reasonable congressional regulation, and that the employment restriction in §499h(b) is a permissible remedial measure. The court held that this sanction is not penal and does not constitute a bill of attainder.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[6]Although the question does not appear to have been raised below, it is doubtful whether petitioner has standing to challenge consequences of its violation that attach to other persons. Paul Steinberg, who is the person affected by the application of Section 499h(b) of which petitioner complains, has not been a party to the proceedings.